No. 92-757

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

BARBARA LANDGRAF,
Petitioner,
v.

USI FILM PRODUCTS, BONAR PACKAGING, INC., and QUANTUM CHEMICAL CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner's Questions I and II present any issue meriting review by this Court?

LIST OF PARTIES AND RULE 29.1 STATEMENT

The Respondents were defendants-appellees below. Quantum Chemical Corporation is a Virginia corporation and a publicy traded company. USI Film Products was a manufacturing plant in the USI Division of Quantum. Bonar Packaging, Inc., is a Canadian corporation and purchased the USI Film Products plant from Quantum subsequent to Petitioner's resignation from employment at the plant. Quantum does not have any parent company. Quantum has the following non-wholly-owned subsidiary companies:

Atlantic Energy, Inc.
CUE Insurance Limited
Fallon Propane and Butane Company
Northwest L.P.G. Supply Ltd.
Petrolane Finance Corp.
Petrolane Gas Service L.P.
Petrolane Incorporated
Quantum Petrochemical Corporation Limited

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RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

Respondents Quantum Chemical Corporation ("Quantum"), its USI Film Products plant, and Bonar Packaging, Inc., subsequent purchaser of the plant, submit this Brief In Opposition to the Petition for a Writ of Certiorari filed by Petitioner Barbara Landgraf. Petitioner seeks review of a unanimous decision by the United States Court of Appeals for the Fifth Circuit (Petition Appendix A) affirming a decision and judgment entered by the United States District Court for the Eastern District of Texas (Petition Appendices B and C). For the reasons explained below, Respondents urge the Court to deny the Petition.

COUNTERSTATEMENT OF THE CASE [1]

Petitioner resigned her employment with Quantum January 17, 1986. On July 21, 1989, Petitioner commenced a civil action against Respondents under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* A bench trial was held on February 4, 1991. On May 22, 1991, the district court entered Findings of Fact and Conclusions of Law (Petition Appendix B) and judgment against Petitioner (Petition Appendix C). Petitioner appealed to the Court of Appeals for the Fifth Circuit. The appeal was briefed.

On November 21, 1991, the Civil Rights Act of 1991 ("Act"), Public Law No. 102-166, 105 Stat. 1071 (1991), was signed into law. On February 6, 1992, one year after the trial, Petitioner raised to the Fifth Circuit a claim of potential retroactive application of the Act to her previously litigated claim. On July 30, 1992, the Fifth Circuit denied Petitioner's appeal and affirmed the judgment of the District Court (Petition Appendix A). *Landgraf v. USI Film Products, et al.*, 968 F.2d 427 (5th Cir. 1992).

The Fifth Circuit utilized the approach of *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974), that a court generally should "'apply the law in effect at the time it renders its decision,'" 968 F.2d at 432, *quoting Bradley*, 416 U.S. at 711. Citing *Bennett v. New Jersey*, 470 U.S. 632 (1985), the Fifth Circuit concluded that it could not presume that Congress "intended to upset cases which were properly tried under the law at the time of trial." 968 F.2d at 432. Instead, "[t]o require [the employer] to retry this case because of a statutory change [right to jury trial] enacted after the trial was completed would be an injustice and a waste of judicial

[1] Petitioner's Statement of the Case is improperly argumentative and plaintive.

resources." *Id.* at 432-33. Similarly, "[r]etroactive application of this [compensatory and punitive damage] provision to conduct occurring before the Act would result in a manifest injustice," because these added damages constitute "'an additional and unforeseen obligation' contrary to the well-settled law" at the time of trial. *Id.* at 433, quoting *Bradley*, 416 U.S. at 721.

REASONS FOR DENYING THE WRIT

I. THIS FIFTH CIRCUIT DECISION AND THE NINTH CIRCUIT'S *DAVIS* DECISION DO NOT NECESSARILY CONFLICT ON THE SAME MATTER.

The Fifth Circuit held in this case that the two substantive provisions of the Act raised by Petitioner after her appeal from the trial court's judgment, the right to a jury trial [§ 102], 42 U.S.C. § 1981A(c), and the availability of compensatory and punitive damages [§ 102], 42 U.S.C. § 1981A(a)(1), should not be applied retroactively to cases that already have been adjudicated and are on appeal. *Landgraf*, 968 F.2d at 432-33. The Fifth Circuit found no clear statutory language or legislative history. It noted that the principles of judicial presumptions on retroactivity were somewhat uncertain, *see Bradley v. School Board of Richmond*, 416 U.S. 696, 715-16 (1974) (court should apply the law in effect at the time unless there is clear statutory or legislative history to the contrary or unless doing so would result in a manifest injustice), and *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988) (presumption against retroactivity unless the language of the statute or its legislative history require a contrary result). The Fifth Circuit did not try to resolve any uncertainty caused by these cases, for it concluded that, even under *Bradley*, § 102 should not be applied retroactively. The Court found that to do so would be a manifest injustice, because a case that had been properly tried under the law at the time of trial would be upset and to retry it would

be an injustice and a waste of judicial resources. *Landgraf*, 968 F.2d at 432-33. The Court also found that to apply the provision allowing recovery of compensatory and punitive damages would be an injustice, because permitting damages that were not available at the time of trial would pose an additional or unforeseeable obligation contrary to the well-settled law before the Act's date of enactment. *Id.* at 433.

Petitioner contends the Ninth Circuit decision in *Davis v. City and County of San Francisco*, 976 F.2d 1536 (9th Cir. 1992), is in conflict with the holding in her case. The only provision of the Act involved in *Davis* was that allowing for recovery of the cost of expert witnesses [§ 113], 42 U.S.C. § 2000e-5(k). The issue was whether that section concerning costs and fees should be applied to Davis' case, which had been tried and was on appeal on the date the Act became effective.[2] The Ninth Circuit held that the language of the Act itself made it clear the Act was to be applied to pending cases. *Id.* at 13. *Landgraf* thus holds that § 102 should not be applied retroactively, and *Davis* holds that § 113 should.[3]

The Act contains numerous provisions on a variety of matters, some of which involve substantive rights and liabilities, others of which do not. Respondents submit that applying Section 113, concerning costs such as the

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[2] *West Virginia Hospitals, Inc. v. Casey*, 111 S.Ct. 1138, 1148 (1991), held that 42 U.S.C. § 1988 (an attorney's fee provision parallel to 706(k) in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k)) did not permit recovery of expert witness fees. Thus, a party could only recover the standard witness fees of $40.00 a day available under 28 U.S.C. § 1821(b). The issue in *Davis* was whether she would recover $40.00 a day for the expert witness or the $12,200.00 she requested.

[3] The Ninth Circuit's decision in *Davis* is elaborate in its analysis, but the context and application of that analysis is the non-substantive issue of the costs of an expert witness, not the substantive rights and liabilities of jury trials and compensatory or punitive damages dealt with in *Landgraf*. There is no conflict "on the same matter." Supreme Court Rule 10.1(a).

expert witness fees involved in *Davis*, to a case pending trial or appeal would not be considered a manifest injustice under *Bradley*. Rather, it is consistent with *Bradley*, in which this Court held that applying a provision for the award of attorney fees retroactively was not a manifest injustice. 416 U.S. at 721. It also is consistent with the holding of the Fifth Circuit in *Landgraf*, that retroactively allowing jury trials and compensatory and punitive damages (particularly in cases that have already been tried) is a manifest injustice under *Bradley*. 968 F.2d at 432-33. Each conclusion is consistent under *Bradley*.

II. THE ALLEGATION OF CONFLICT BETWEEN DECISIONS OF TWO CIRCUITS DOES NOT REQUIRE GRANTING THE PETITION.

The existence of a conflict between Circuit Courts of Appeals may be a basis for granting a Petition for Writ of Certiorari, but that does not mean the Court is required to accept this case for review. The Court frequently has denied Petitions for Writ of Certiorari that were based on a conflict in the Circuits. *See, e.g., Walker v. United States*, 113 S.Ct. 443 (1992); *Christophersen v. Allied-Signal Corp.*, 112 S.Ct. 1280 (1992) (Justices White and Blackmun dissenting) (certiorari denied, despite a split in the Circuits, on the issue of the appropriate standard for determining the admissibility of expert testimony); *Beaulieu v. United States*, 110 S.Ct. 3302 (1990) (Justice White dissenting and noting 48 instances during that term when Petitions based on Circuit splits had been denied) (certiorari denied, despite a split in the Circuits, on the issue of reliance on co-conspirators' testimony for purposes of sentencing); *Brown Transport Corp. v. Atcon, Inc.*, 439 U.S. 1014 (1978) and cases cited therein (Justice White and Blackmun dissenting) (certiorari denied despite a split in the Circuits, on the issue of whether the failure of a common carrier to comply with the time limits of the Interstate Commerce

Commission regulations estops it from collecting freight charges from the shipper). There are many reasons to do so here.

A. The Court has had the opportunity to address whether the Act or portions of it should be applied retroactively but has chosen not to do so.

The Act has been in effect for over one year. During this time and prior to October 6, 1992 (the date of the *Davis* decision), several Circuits addressed the issue of the Act's retroactivity and determined that it or portions of it should not be applied retroactively. Petitions for Writ of Certiorari were denied in two of those cases. *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929 (7th Cir.), *cert. denied*, 113 S.Ct. 207 (1992); *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir.), *cert. denied*, 113 S.Ct. 86 (1992).

Even assuming (for argument only) Petitioner's claim that there may be a conflict between *Landgraf* and *Davis*, the Court should continue to exercise its discretion and deny the Petition on the retroactivity issue as it has in the past. *See, e.g., Walker v. United States, supra* (Justices White and Blackmun dissenting) (certiorari denied despite split in Circuits; Court had declined to review the same issue on three prior occasions).

B. Only one of numerous sections of the Act is at issue in this particular case.

The issue in *Landgraf* only involves whether one section of the Act [§ 102] should be applied retroactively. The Act contains numerous other provisions. They cover a variety of subjects, both substantive and procedural. Different results might obtain based on which particular section or sections are at issue. As noted above, there is as yet no conflict in the Circuits on the issue of prospective application of § 102 in *Landgraf*.[4] The Court should wait until further law develops, to see if a case involving a broader range of sections comes forth.

C. The particular chronological context in which this case arose is narrow.

The issue in *Landgraf* is limited to whether one section of the Act, involving substantive rights and obligations, should be applied to a case that involves conduct occurring five years before the Act's effective date, that already was tried on the merits before the Act's effective date, and already was on appeal (indeed, already had been briefed) when the Act became effective. That is a unique status giving rise to particular manifest injustice under *Bradley*.

Cases will arise under other fact patterns, such as cases which are tried *after* the effective date but were filed before the Act's effective date and arise from conduct occurring before that date; or were filed after the Act's effective date and arise from conduct occurring before that date; or were filed either before or after the Act's effective date and arise out of conduct that straddles the effective date. The Court may find it more appropriate to wait until a case comes before it containing a fact pattern in which the case had not been adjudicated, appealed and briefed as of the Act's date of enactment.

D. Variance in results of the Circuits on this issue is not unexpected and not intolerable.

Uniformity in the Circuits on the issue of retroactivity is not required on an absolute basis. Inherently nonuniform results may be expected, and is not intolerable, because the different issues and facts involved, at dif-

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[4] There is a split in the Circuits over Section 113 at issue in *Davis*. The Eighth Circuit held that Section 113 should not be applied retroactively. *Huey v. Sullivan*, 971 F.2d 1362 (8th Cir. 1992). *Davis* held that it should. Section 113 is not involved here.

ferent points in the legal process, virtually guarantee somewhat different cutting off points in different Circuits. If these vary a bit, Circuit to Circuit, the variance is not an issue of national importance. Different cases are litigated at different speeds, and the individual reactions of Circuits to the particular cases before them do not give rise to a conflict meriting the Court's review.

E. The issue is inherently self-limiting.

Even viewed broadly, this issue—the retroactivity of the Act—is inherently self-limiting in its effect. It will only affect a very limited pool of cases for a very limited period of time, after which the issue will be moot. This is not the kind of case to which the Court should devote its scarce resources.

F. Allowing other Circuits further opportunity to address retroactivity will provide greater illumination of whether the issue has created a conflict necessitating the Court's attention.

Petitioner contends that the Courts are in "hopeless disarray." [Petition at p. 6]. That overstates the situation. Seven Circuits have addressed the retroactivity issue, but only one Circuit has found that any section of the Act should be applied retroactively, and that section involved witness fees, not substantive obligations or rights. The fact that one Circuit has now found retroactivity for one section of the Act involving costs and fees does not amount to "hopeless disarray."

The Court should consider waiting until one or more Circuits (including the remaining five Circuits that have not yet spoken to the Act) address the Ninth Circuit's *Davis* decision. This will permit the opportunity for greater illumination on the issue of the Act's retroactivity and whether there is a conflict that needs to be resolved by this Court.

III. VICTIMS OF DISCRIMINATION ARE AFFORDED REDRESS IRRESPECTIVE OF WHETHER LANDGRAF'S PETITION IS GRANTED.

Petitioner argues that the Petition must be granted to afford her (and those in her situation) redress because one of the purposes of the Act was to provide additional remedies to deter unlawful discrimination. It is a *non sequitur* for Petitioner to argue that such a purpose is retroactive: the Act hardly can deter conduct already alleged to have occurred *before* the Act.

Petitioner's situation (case tried and law at the time applied, before the effective date of the Act) would apply to any plaintiff who litigated in a Title VII lawsuit prior to the Act's effective date (from 1965 through November 21, 1991). It is no more an injustice for Landgraf not to be able to *retry* her case to a jury (with the opportunity to recover compensatory and punitive damages not previously available) than it is for any plaintiff in years past not to obtain a retrial by jury with the opportunity to recover damages that were not available under the law in effect when their cases were tried.

Petitioner (like all other plaintiffs who litigated on the merits before November 21, 1991) was afforded the appropriate redress available under Title VII as it existed at that time. Individuals who were or may be subjected to intentional discrimination after November 21, 1991, will be afforded the appropriate redress available at the time their cases are tried, and the jury trial and damage provisions of § 102 *will* operate to deter unlawful discrimination.

IV. ALLEGED MISAPPLICATION OF A PRINCIPLE IS NOT A BASIS TO GRANT THE PETITION.

In a final argument, Petitioner shifts from the need to resolve an alleged conflict between *Bradley* and *Bowen* concerning the application of judicial presumptions to a contention that there is no conflict, only a misapplication of the principle by the Fifth Circuit.

Several Circuits have concluded that *Bradley* and *Bowen* can be read in a non-conflicting manner, particularly given *Bennett v. New Jersey*, 470 U.S. 632, 638-40 (1985). *See, e.g., Johnson v. Uncle Ben's Inc.*, 965 F.2d 1363, 1373-74 (5th Cir. 1992); *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929, 936 (7th Cir.), *cert. denied*, 113 S.Ct. 207 (1992); *Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886, 898-900 (D.C. Cir. 1992). The Court in *Bennett* noted that *Bradley* was limited by another rule of statutory construction: statutes affecting substantive rights and liabilities are presumed to have only prospective effect. 470 U.S. at 638-40. *Bradley* involved allowance of attorney fees, which is not a provision involving substantive rights under a statute. The issue of the applicability of a provision for the award of expert witness fees in *Davis* is parallel to the issue of the applicability of a provision for the award of attorney fees in *Bradley*. The matters (availability of a jury trial and compensatory or punitive damages) at issue in *Landgraf* are different: they *do* affect substantive rights and liabilities. As in *Bennett*, they should not be given prospective effect. 470 U.S. at 639-40.

The Petition here ultimately contends that the Fifth Circuit simply misapplied the principle of judicial presumptions that it used. Respondents disagree, but even assuming Petitioner's contention *arguendo*, the mere misapplication of a principle in a particular case should not be a basis upon which the Court grants a Petition for a Writ of Certiorari.

Petitioner's argument here is not an attempt to have the Court resolve any true conflict in the Circuits. Rather, it is an effort to have the Court reject the precedent of *Bradley* and *Bennett* and create a rule that undoes cases already tried under one set of substantive rights, obligations and remedies that were the law of this land at the time of trial. As *Bennett* recognizes, "statutes affecting substantive rights and liabilities are presumed to have only prospective effect." 470 U.S. at

639-40, 105 S.Ct. at 1560. There is not yet any conflict in the Circuits concerning the non-retroactive application of the "substantive rights and liabilities" in the Civil Rights Act of 1991. Petitioner's argument that the Fifth Circuit erred in applying the principles of *Bradley* and *Bennett* does not make an issue meriting review by this Court.

CONCLUSION

The Ninth Circuit's *Davis* decision does not present a square and unreconcilable conflict with the Fifth Circuit's decision in this case. Even assuming a conflict, this is not an appropriate case for the Court to address. The issue is self-limiting, and the impact is narrow, confined and not intolerable. Further experience will help illuminate the issue, and further Circuits should be given the opportunity to address the Ninth Circuit's *Davis* decision before a determination of whether granting Certiorari is necessary or appropriate. The Fifth Circuit's principle of the manifest injustice of retrying conduct and claims litigated, tried, appealed and briefed prior to the enactment of new legislation, consistent with both *Bradley* and *Bennett*, need not be disturbed by this Court until there is a clearer and more compelling conflict in the Circuits on *that* issue. The Petition should be denied.

Respectfully submitted,

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